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Supreme Court of the United States

OCTOBER TERM, 1906.

THOMAS MILNER HARRISON,

vs.

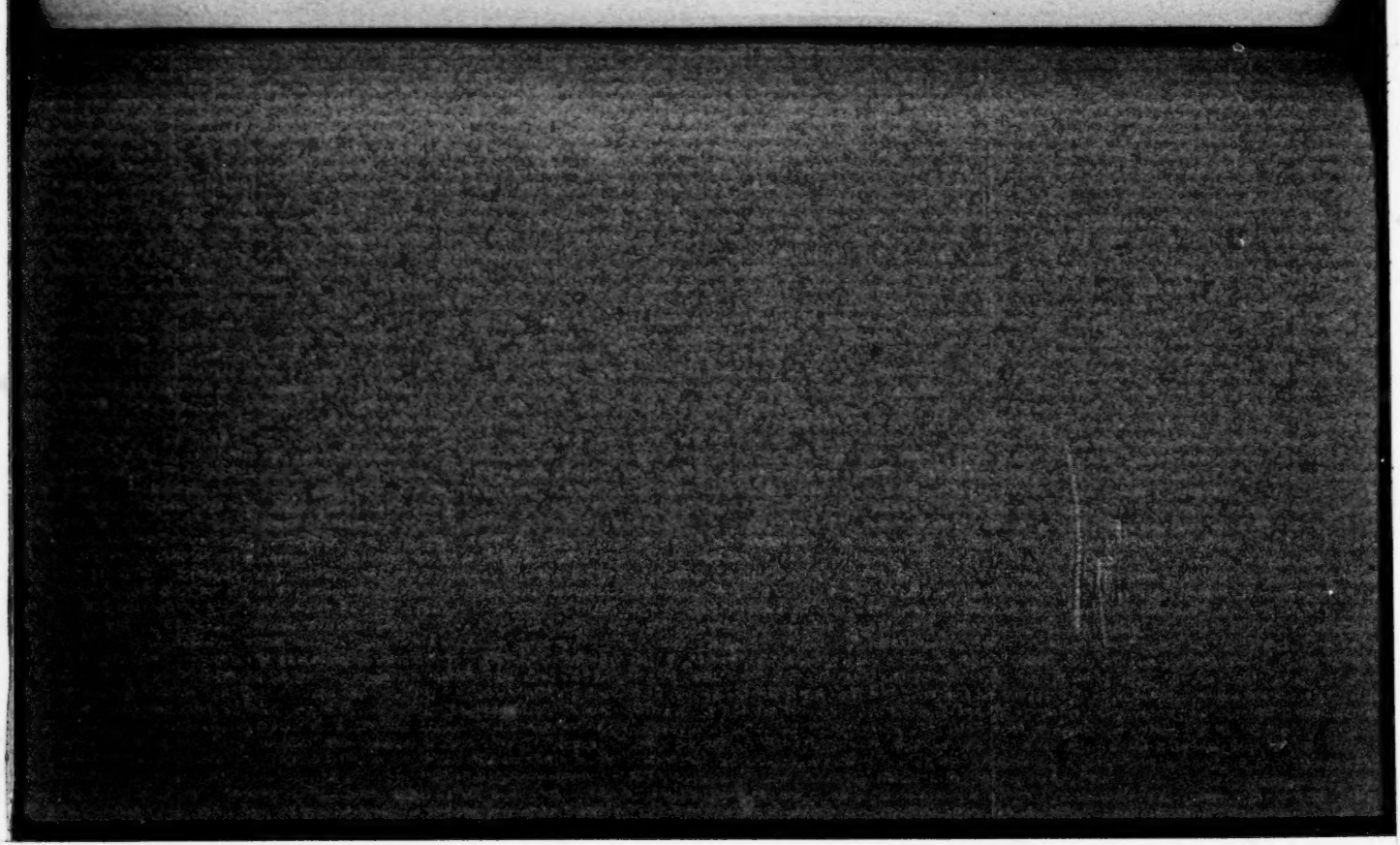
J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,

Defendants-in-Error.
Plaintiff-in-Error,

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR DEFENDANT-IN-ERROR, L. C. ABLES.

E. B. McCLANAHAN,,
Attorney for Defendant in Error, L. C. Ables,
S. H. DERBY,
Of Counsel.



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We shall endeavor to present this case briefly and concisely, though we shall try to answer all points affecting the liability of the Defendant Ables, as far as the burden rests on him to answer them.

RE PLAINTIFF'S STATEMENT OF FACTS.

There are certain statements of fact made by the plaintiff, which we desire to qualify, both as to the facts themselves and the inferences drawn from them.

THE SUB PARTNERSHIPS BEFORE THAT WITH HARRISON: As to the partnership with Wolfenden, he was a rival preacher and was bought out by giving him an interest in the Hagey partnership. No *guarantee* to him of any sum was made and no additional liability incurred, so it is wholly unnecessary to consider whether the Honolulu partners were cognizant of his coming

in or not. As regards the other subpartnership, Ables expressly says: "I did not think enough of the scheme to sign any of the papers" (Transcript p. 193). And Magoon and Mrs. Emerson say in a letter: "Messrs. Cowart and Kirkpatrick have signed or are about to sign, an agreement, guaranteeing to certain gentlemen in Auckland ten per cent. on an amount of money to be invested in the business. In a moment of enthusiasm they have appeared entirely to overlook the fact that according to our agreement they cannot bind the members of the company in any way, I think that immediately the fact is put before them they will see the necessity of explaining to these gentlemen that they had exceeded their authority, as Miss Lamb and I refuse to be bound by any such agreement on their part" (Transcript Pages 198-199). No theory of acquiescence in any sub partnerships at all resembling that with Harrison can bind the defendants who were in Honolulu, when the partnerships were formed.

THE HARRISON AGREEMENT: Magoon, McStocker and Emerson only signed this through attorneys not authorized to sign it, and A. E. Powter, one of the partners, did not either sign or afterwards ratify it.

HARRISON'S KNOWLEDGE OF THE CONTENTS OF THE ARTICLES OF PARTNERSHIP AND POWERS OF ATTORNEY: When the completed agreement was executed Harrison undoubtedly knew of these. It was only at the time of the "first draft" that he did not and "when I afterwards saw them I wanted some changes made." See also opinion of Perry J. on first trial of this case 14 *Haw.* at Page 422.

COWART'S LETTER TO MAGOON EX. L: Plaintiff relies on this and so do we. It says: "We *sold* one-half interest in Tasmania last week for 8000 sheep and 500 pounds . . . ." He also relies on Ables' letter to McStocker (Ex. D), which says: "The *sale* of Tasmania was for nine-twentieths of the Territory. We *get* this amount of money and about 6000 sheep . . . of uncertain value." See also Magoon's letter to Dexter (Ex. 8, Transcript Page 203), where he says: "They have sold territory, as I understand and *taken in payment* sheep and lands, which they had no right to do."

MOORE'S VISIT TO HONOLULU: There is not a scintilla of evidence that Moore told the partners in Honolulu of the Harrison agreement and the undisputed evidence is that he did not, so far as the witnesses knew (Transcript Pages 85-86). Magoon's letters to Dexter show that he would absolutely have

repudiated any such agreement. Plaintiff's claim that they knew of the details of the agreement is an assumption pure and simple.

THE DIVIDEND OF 18%. Plaintiff claims that the trial balance from which this dividend was made up showed that part of it came from the Harrison agreement. This is clearly not so and no fact in the record bears it out.

THE VALUE OF THE SHEEP AND THEIR SUBSEQUENT SALE FOR 500 POUNDS: We do not admit plaintiff's contentions as regards these matters, but do not go into them because we believe them to be immaterial.

THE START FOR TASMANIA: Plaintiff expressly says that he started for Tasmania on October 4th, 1906. We shall show the importance of this admission later. Of course plaintiff's statement that the defendants promised to return the sheep is incorrect, if it refers to all of the defendants.

Apart from the above criticisms we do not care to further discuss the facts except in argument.

THE PLEADINGS.

In regard to these we simply wish to say that as our Supreme Court in 13 Haw. 361 overruled plaintiff's exceptions to the sustaining of the demurrer to the Complaint, remarks as to *some* of the grounds of demurrer not being tenable would be obiter dicta and not "the law of the case."

THE TRIALS.

One of plaintiff's statements in regard to these will bear correction. He says that the Supreme Court overlooked the fact that the New Zealand Summons was served on Ables as soon as he could be found. This was not so. The demand relied on and alleged in the Complaint was that of March 10th 1898 on Cowart and Kirkpatrick. It was only at the last trial that plaintiff veered round and relied on the New Zealand Summons as a demand.

ARGUMENT.

THE QUESTIONS AS TO THE AUTHORITY OF KIRKPATRICK, COWART AND ABLES TO SIGN THE HARRISON AGREEMENT ON BEHALF OF MAGOON, EMERSON AND McSTOCKER AND AS TO THE RATIFICATION OF THE AGREEMENT BY SAID MAGOON, EMERSON AND McSTOCKER.

The firm, to which the writer of this brief belongs, put in an elaborate brief on the question of the authority to execute the agreement when the case came before the Supreme Court of Hawaii after the first trial (14 Haw. 418), and another almost as elaborate on the subject of ratification after the second trial. (16 Haw. 332). Both contentions were sustained by our Supreme Court.

Harrison vs. Magoon 14 Haw. at Pages 421-424
Harrison vs. Magoon 16 Haw. at Pages 335-337.

The firm does not now represent any one except the defendant Ables in this Court, the other defendants being represented by Mr. Magoon. Although, to relieve Ables, it is perhaps necessary to establish that Magoon, McStocker and Emerson are not bound by the agreement, the burden of sustaining these contentions rests mainly on them and we look to them to show, as they doubtless will, that the agreement was executed without authority and was not ratified by them. We shall therefore pass over the points in question and come directly to the defences of the defendant Ables, assuming that the non liability of Magoon, McStocker and Emerson is established. We would remark, however, that many of the facts previously corrected bear on these points alone.

THE DEFENDANT ABLES CANNOT BE HELD INDIVIDUALLY ON THE HARRISON AGREEMENT.

We prefer, owing to lack of time given to answer plaintiff's brief, not to discuss the points in question in the same order which he has, but instead we shall first advance the points as to the non liability of Ables exactly as we advanced them in the Supreme Court of Hawaii with a few minor changes so as to make those arguments clearer to this Court. We shall

then take up certain additional grounds and make such further observations as plaintiff's brief seems to require.

1.

THERE WAS AN INSUFFICIENT NOTICE OF DISSATISFACTION TO AND AN INSUFFICIENT DEMAND ON ABLES.

Harrison in his complaint alleges that he gave notice of his dissatisfaction to *the defendants* and made a demand on them to deliver the stock called for by the agreement on March 10th 1898. This notice was shown to have been given to Kirkpatrick and Wolfenden alone and the demand was made on them alone (Tr. p. 107). No notice by way of letter or otherwise was given the other defendants, certainly not to Ables until the New Zealand Summons was served on them on July 23rd 1898 by Mr. E. A. Mott-Smith (Tr. p. 147), said Summons having apparently been taken out on April 18th 1898 (See Summons, Ex. M.).

The very point now in question came up at a former trial, where, after the judgment had been reversed, plaintiff moved for a rehearing as to Ables' liability on the ground that as he personally signed the Harrison agreement, he could be held apart from the other defendants.

On this point the court said:

> "The point mentioned in the present motion, while not expressly referred to, was disposed of by the decision. It was not overlooked. The action was brought against nine persons. The notice and demand relied upon was shown to have been made upon Kirkpatrick alone or, perhaps, upon Cowart and Kirkpatrick; in any event, no notice or demand was shown to have been made upon any of the other defendants. The notice to Kirkpatrick could affect the other defendants only upon the theory of a joint liability. If all of the nine are jointly liable,—and upon the present state of the case it may yet be proved that they are—recovery cannot be had against three or four only of the joint contractors. With possible exceptions not material in this case, the recovery must be either against all who are jointly liable or against each of the persons separately upon his several liability and in the latter case notice

to one would not, by mere operation of law, be notice to any of the others."

See 14 Haw. 532.

That is, the court particularly held that the demand on Kirkpatrick on March 10th 1898 could affect the other defendants only on the theory of a joint liability and that the recovery would have to be either against all jointly or against each one separately on his several liability, in which latter case a several notice to and demand on each would be required. The court naturally assumes that the notice and demand in question in this suit is the notice and demand of March 10th 1898. No other was suggested till the motion for a nonsuit was made at the last trial. The court seems to intimate that the question is open whether less than all of those whose names are attached to the agreement can be still held *jointly*. This intimation seems wholly at variance with the language of the court just quoted and will be considered under another head. We will at present assume that, as Magoon, McStocker and Emerson (as well as Powter, concerning whom *no evidence whatever* of ratification was given) cannot be held, Ables can only be held on his several liability, thus necessitating a several notice to and demand on him.

It is very obvious that the notice to Kirkpatrick was not notice to Ables and plaintiff at the last trial was forced to rely on his New Zealand Summons to help him out of his difficulty. This summons was received by the defendant Ables more than six months after Harrison started for Tasmania. Harrison claims that he started for Tasmania on Jan. 17th 1898, in which case the Summons was issued less than six months before his time was up, though not served till after it was up. The evidence, however, seems clear that he started October 4th 1897, immediately after the execution of the agreement (See Plff's brief p. 8) and if this be so, his notice was not even issued or mailed within the necessary six months. Under either theory we contend that the notice claimed, assuming it can be relied on, was too late, but the facts are undisputed and we contend they absolutely establish that Harrison started for Tasmania on October 4th 1897, under the terms of the contract. Furthermore the allegations in the New Zealand Summons were that plaintiff *had* given notice of dissatisfaction to and made demand

on the defendants on March 10th 1898. There was no statement that he actually was dissatisfied.

Plaintiff never intended his New Zealand suit to be a notice and demand and cites no applicable authorities to show that it was, even if the court should hold that it was in time. We contend that it clearly was not the notice and demand required under the contract. It merely showed, if anything, that plaintiff *had* given notice and made a demand, and as Ables had never received any such notice or demand he had a right to rely on the fact that Harrison had *not* notified him and may now claim that he is not *severally* liable. Harrison did enough in the way of notice and demand to hold Ables jointly, if he can be so held, but he did not do enough to hold him *severally*. This distinction is important and should be borne in mind.

In view of the foregoing it seems hardly necessary to discuss most of plaintiff's cases on this subject. They do not bear on this case at all if the New Zealand suit was not a several notice and demand.

The question of reasonable diligence which some of them raise may be slightly in point, but plaintiff's diligence is a rather minor issue in this case. The plaintiff never intended the New Zealand Summons to operate as a notice and demand and hence his diligence in getting it out is wholly immaterial.

Another and to our minds a conclusive reason why plaintiff cannot claim that the Summons was a notice and demand is that the notice and demand alleged in this case were alleged to have been given or made on or about March 10th 1898, the date of the demand on Kirkpatrick. Plaintiff has plainly proceeded on the theory of a joint obligation in relying on this demand and should not be at this date allowed to set up a totally different notice and demand for the purpose of holding Ables *severally* liable.

While it may not be necessary to allege in a declaration the exact time that notice was given and demand was made, we submit that where these things must be alleged they must be reasonably certain.

See 4 Encyc. Pl. & Pr. 646, 653, 654.

And if the complaint contains the proper allegations of demand and notice, a nonsuit will be granted where the proof fails to support them.

Id. 663.

If plaintiff had set out in his Complaint that notice was not given till more than six months after he started for Tasmania as he would have had to do in relying on the New Zealand Summons he would have been bound to show an excuse for his delay.

14 Encyc. Pl. & Pr. 1070.

The citation from page 1071 of the same authority found in defendant's brief is shown by the context to be opposed to the general rule.

These general principles go clearly to show that plaintiff must allege at least due notice and demand as he has done, and if he alleges something less than due notice and demand he must excuse himself in some way. The necessary inference is that he cannot allege one notice and demand and then rely on another, or allege a notice and demand which is due and proper and then rely on a notice and demand which needs an excuse. And this is especially true where, as here, *one* notice and demand is alleged against all the defendants and is founded on the theory of a *joint* liability. Under such an allegation it seems to us clear that plaintiff cannot show separate notices and demands on *different dates* to lay a foundation for a several liability.

See on this point

22 Encyc. Pl. & Pr. 527, 608 and cases cited
Eastman vs. Bodfish, Fed. Case 4255,
Kellogg vs. Denslow, 14 Conn. 411. 425,
Gulick vs. Loder, 14 N. J. L. 572.

There is no need to multiply authorities on the subject of variance, for it seems to us that the variance here is so wide and its results are so far reaching that it cannot well be held not to be fatal. As we have said, one demand on a day certain is changed to several demands on different days and a joint liability is thereby changed to a several one.

We contend therefore (a) that the summons is no sufficient notice and demand and (b) that even if it is it cannot be relied on in this case.

The necessity of proving notice and demand is practically conceded by plaintiff and would be clearly necessary under the decision on the motion for a rehearing at the first trial (14 Haw. 532).

If the court should hold that Magoon, McStocker and Emerson have ratified the Harrison agreement, then these principles would also apply in their cases. We call attention in this connection to the fact that there is no evidence that one of the partners, A. E. Powter, ever ratified the agreement. His name was signed by an attorney as were those of Magoon, McStocker and Emerson, and we contend that a failure to connect him with the transaction renders the liability of Magoon, McStocker and Emerson several, if anything, and makes necessary a several demand in their case as well as in that of Ables.

2.

THE NEW ZEALAND JUDGMENT IS A BAR TO THIS ACTION AGAINST ABLES. THIS GROUND APPLIES EQUALLY TO THE CASES OF THE DEFENDANTS MAGOON, McSTOCKER AND EMERSON.

It appears that plaintiff started suit in New Zealand against all of the defendants here sued about April 1898 (See Ex. M) and judgment was recovered against all the defendants except Wolfenden and Powter (Ex. V), Kirkpatrick, Cowart and Wolfenden having been in New Zealand when the suit was brought. We do not see why this judgment does not merge the claims under the contract and bar this action. It is admitted on all sides that plaintiff sought some satisfaction under his agreement in that suit and how can he now come in and sue again, even if we assume that the judgment was only effectual against Cowart and Kirkpatrick?

As regards any *joint* liability the judgment would seem to be plainly a bar by all the authorities.

9 Cyc. of Law & Procedure 654,
1 Daniel on Negotiable Instruments, S. 1296,
Mason vs. Eldred, 6 Wall 231,
Holman vs. Longtree, 40 Ind. 349.

On the question whether a judgment is a bar where the contract is joint and several and there is no satisfaction obtained the authorities are in conflict. Several hold that a party may pursue his remedy against each of the several obligors till he gets satisfaction. We take it, however, that this is not sound law and the point is well illustrated by a decision of the Supreme Court of the United States.

U. S. vs. Price 9 How. 83, 93.

There Judge Grier says:

"But these cases (referring to previous citations) give no countenance to the assertion 'that a joint judgment is not *per se* a satisfaction of a joint and several bond. The law on this subject is too well settled to admit of a doubt, or require the citation of authorities, that, if two or more are bound jointly and severally, the obligee may elect to sue them jointly or severally. But having once made his election and obtained a joint judgment, his bond is merged in the judgment, *quia transit in rem judicatam.* It is essential to the idea of election that a party cannot have both. One judgment against all or each of the obligors is a satisfaction and extinguishment of the bond. It no longer exists as a security, being superseded, merged, and extinguished in the judgment, which is a security of a higher nature. The creditor has no longer a remedy, either at law or in equity, on his bond, but only on his judgment . . . . . "

We contend under this case that the judgment clearly bars the present action. Plaintiff elected to sue in New Zealand, knowing that the four Honolulu defendants were not there and we claim that he is bound by his election. The fact that judgment was not entered against Powter and Wolfenden was presumably because plaintiff failed to prove his case against them and cannot affect the matter one way or the other. He certainly cannot again sue Cowart, Kirkpatrick and Wolfenden and get judgment. Nor can he sue the other defendants jointly because of this fact and because of the fact that he has taken a joint judgment. As to suing them severally, he has already prosecuted an action on the contract to judgment and his contract is thus merged in the judgment. He has elected his remedy and is bound by his election.

Defendants make a further contention on these points. Section 1741 of the Revised Laws of Hawaii requires the joinder of the defendants now being sued. But as there has been a valid judgment against Cowart and Kirkpatrick at least and a valid dismissal as to Wolfenden at least, he cannot now sue those three parties again and hence can sue none of the defendants. Even if we assume that the decision of the United States

Supreme Court heretofore cited is erroneous as a common law doctrine, the terms of our statute make the same result necessary, for plaintiff must sue all under our statute and has estopped himself from so doing by his own acts.

The intimation by the Supreme Court of Hawaii that there would be no merger of the contract in the judgment if the judgment were void (13 Haw. 359) cannot apply in this case. The judgment against the Honolulu defendants may be void, but it cannot be void against Cowart and Kirkpatrick who were residents there.

See *Gilman vs. Rives,* 10 Peters 298, 300.

The judgment being valid against Cowart and Kirkpatrick, our statute prevents this suit. Suppose, for instance, that a valid judgment, instead of having been rendered against Cowart and Kirkpatrick alone, had been rendered against all the defendants except Mr. Magoon. Could plaintiff possibly contend that he could proceed against all the defendants here for the mere purpose of holding Mr. Magoon? We submit not and the present case is the same on principle. The plaintiff could have proceeded in New Zealand only against those resident there had he so desired (see *Gilman vs. Rives* supra) and a void judgment there against the Honolulu defendants would amount to nothing more than a non joinder in effect. It could not release Cowart and Kirkpatrick.

The fact that the judgment is a foreign one can also make no difference.

See *Harrison vs. Magoon* 13 Haw. at Page359.

We submit this point as decisive of the case, although it is in no way referred to in plaintiff's brief.

3.

ABLES CANNOT BE HELD LIABLE ON THE CONTRACT, IT BEING IMPOSSIBLE TO HOLD MAGOON, EMERSON AND McSTOCKER, AND CERTAIN OTHER DEFENDANTS.

This is the ground on which Judge Robinson, the trial Judge, granted the non-suit as to Ables and deserves very full consid-

eration. The contract was signed by Cowart, Kirkpatrick, Wolfenden and Ables personally. Just how the contract was signed for the others appears in 13 Haw. 344. The signatures in each case were "A by his attorney B." Magoon, Emerson, McStocker and Powter not being liable can Ables be held on the contract? (The question of what other remedy plaintiff might have need not be considered except incidentally.)

One of plaintiff's contentions in this regard is that Ables may be held as an *agent*. As the only agency Ables assumed was to act for McStocker, the question is whether the signature "Frank B. McStocker per his Atty. L. C. Ables" binds Ables *on the contract* in place of McStocker. It seems to us clear that it does not.

There is no doubt that a signature such as "A agent for B" and even perhaps "A for B" would bind A individually on the contract. But a contract signed "A by his agent B" is the contract of A or of no one at all. It does not purport nor is it intended to bind B.

Certain cases cited by plaintiff clearly bring out this distinction. In *Bell vs. Teague* (3 So. 861) defendant contracted in his own name (see p. 863). This also was the case in *Hull vs. Brown* (35 Wis. 659) (see pp. 657, 659). So also in *Hastings vs. Lowering* (3 Pick. 214) the agent endorsed without qualifying his signature.

The citation quoted by plaintiff from

1 Encyc. Law 1127, 1128

correctly states the law by pointing out that there is a small class of cases where the agent is held liable, but that by the weight of authority the agent is not liable when signing his principal's name as agent for the reason that in making the contract he in no way attempted to bind himself.

See also cases cited in 1 Encyc. Law 1128 note 2
Abbey vs. Chase 6 Cush. 54, 56,
Hall vs. Crandall 29 Cal. 568.

To hold the agent in such cases is to make a new contract for the parties and violate the fundamental doctrines of the law of agency.

The correct remedy is well pointed out as follows:

> "As a person entering into a contract as agent for another warrants his authority . . . . . it may be stated generally that the remedy against one who assumes to act as agent for another, and in that capacity undertakes to make a contract binding upon his principal, is in the nature of an action for deceit, or upon the breach of his implied warranty of his authority, according to the facts of the case."

1 Encyc. Law 1127.

In this case, however, there is no liability in Ables as agent irrespective of the foregoing principles. Harrison admittedly knew all the facts as regards Ables' authority and merely made a mistake of law.

See 14 Haw. 422.

As to this, the law is as follows:

> "To give a party a right of action against a professed agent, he must have been ignorant of the want of authority on the part of the latter and have exacted upon the faith of the representations, express or implied, that the professed agent had the authority assumed. Hence, if the party complaining is fully cognizant, of all the facts touching the agent's authority, the latter will not be liable."
>
> "Where all the facts are known to both parties and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be bound is no ground for charging the agent."

1 Encyc. Law 1127.

Hence we contend that Ables cannot be held in this action *on the contract* on any ground of agency.

Plaintiff's partnership cases also do not touch the proposition in this case. It is not a case of one partner signing the firm name but of certain of the partners signing themselves individually and *as agents* for others. For instance in signing McStocker's name Ables did not sign as McStocker's partner but as his attorney or agent and so expressed himself in clear terms.

There is no question of partnership involved in such a transaction and it was an entirely incidental and immaterial fact that Ables happened to be McStocker's partner as well as his agent.

There are many cases cited by plaintiff under this head and we have examined them carefully. Many are not in point and those which are merely establish the rule as laid down by Bates that a partner signing the firm name is himself bound. This rule is one of the many peculiar features of the law of partnership and we do not desire to dispute it, but it has no real bearing on the case at bar. We have here a case of certain partners signing for other members of the firm *not as partners,* but as private agents and under purely individual powers of attorney. This distinction is all important and when once it is fairly grasped it cannot fail to be convincing. It is true that Ables was in fact a partner with McStocker, but he signed as his private agent and not as his partner or by virtue of his partnership authority. If one, John Smith, had been McStocker's agent he would not be bound if he signed for McStocker, and Ables, with his power of attorney to act for McStocker, as far as McStocker was concerned, and not for the partnership, stands on the same footing as John Smith.

What to our mind is the really vital point in this connection and by which the lower court was principally troubled is the one to which plaintiff devotes very little space in his brief i. e. whether as one of several joint *and several* obligors Ables can be bound although several of the others who were to sign the contract with him never did so and never became liable thereunder. This presents a very difficult question on which the authorities are not altogether in harmony.

It is to be noted at the outset that all of plaintiff's cases are cases of joint and several *bonds.* Not a single case of a contract is cited and such cases will be found extremely difficult to find.

The bond cases are naturally more numerous than others and we shall deal first with that class of cases. It is not disputed that plaintiff's cases lay down the rule contended for as to bonds nor is it disputed that there are others to the same effect. The authorities are very evenly divided and all that we can do is to cite cases opposed to those cited by plaintiff and endeavor to point out that they rest on sounder principles.

Plaintiff cites a case from 10 Mass. 442. In this connection we desire to refer the court to two later Massachusetts cases which seem to either distinguish or overrule it.

Bean vs. Parker 17 Mass. 591,

was the case of a bail bond where the principal did not sign. The court says on Page 604:

> "Now, a bond or other instrument, intended to be executed by several is not good against one alone; and a declaration which should set forth a bond purporting to be made by A as principal and by B and C as his sureties, would not be supported by producing in evidence a bond made by his sureties alone."

And a later Massschusetts case points out that the controlling feature in this class of cases is whether it is intended that all the parties should execute it and whether the parties held liable would have a remedy *for a contribution* against those who are expected to but do not execute the bond.

Mattoon vs. Barnes 117 Mass. 463, 466.

Ables would of course have no right of contribution here against Magoon, Emerson and McStocker.

In speaking of a joint and several bond not signed by the principal the Supreme Court of Minnesota says:

> "*Prima facie,* the instrument now being considered was incomplete and invalid and was not binding upon those who signed it as sureties. Nor can we see that a distinction can be drawn between bonds which are simply joint and those which are joint and several, as was that in controversy."

Martin vs. Hornsby 55 Minn. 187, 190.

See also

Hall vs. Parker 39 Mich. 287, 288,
Bunn vs. Jetmore 70 Mo. 288,
State vs. Austin 35 Minn. 51.

All the cases admit that a party signing a joint and several bond is not liable, if, when he signs, he makes the condition that others are to sign too. The main question is whether this

condition is not to be presumed till the contrary is shown. We call attention in this connection to the case of

Johnson vs. Township 39 Mich. 187, 188,

where Campbell J. says:

> "We are quite aware that there is a conflict in the cases on this subject as to the presumption of consent and the burden of proof . . . In *Wells vs. Dill,* 1 Mart. (La.) (N. S.), 592, the doctrine was thus laid down: 'The contract is incomplete until all the parties contemplated to join in its execution affix their names to it; and while in this state cannot be enforced against any of them. The law presumes that the party signing did so, upon the condition that the other obligors named in the instrument should also sign it; and their failure to comply with their agreement gives him the right to retract . . . . ' In our opinion this doctrine is the safest and most in accordance with principle."
>
> "Where several names are written as co-obligors and one of them is called upon to sign it, he does so upon an implied understanding that he can in case of being held responsible, not only have his right to contribution, but a further right to have it capable of proof and enforcement according to the terms of the contract as it purports to be drawn up . . . . . "
>
> "The present case is within the principle of those cases which throw the burden of proof on the sureties to establish their non consent, for here that non consent was made out. But we are not disposed to follow that rule, which seems to us in violation of the fundamental principles of suretyship, and essentially unjust."

Another case which is very much in point here is:

Pepper vs. State 22 Ind. 399.

The head note reads:

> "Where an official bond is drawn up and certain names are inserted in the body of it as obligors, and a part only of such names are actually signed to it, the obligation will not become binding upon them until it is executed by all, on the ground that the presentation of such bond, so pre-

pared, to such persons (named in it) as signed it, amounted to a representation that all the persons named in it would sign it before its delivery."

"Where such a bond is presented to such a person for his signature, by the principal in the bond, and such person signs it, there being several signatures attached to it already, and it afterwards appears, from some cause, that the bond is not binding on some or any of the persons whose names preceded his, it should be held not binding upon him, unless it be shown that he had knowledge of its invalidity as to the others at the time he signed it."

See opinion pp. 417, 418 for elaboration of these principles.

We strongly contend that these cases cited by us represent better law than plaintiff's cases and that their effect is to establish the non liability of Ables on the Harrison agreement.

We have already noted that the cases which plaintiff has cited are *bond* cases and he has not referred us to any cases of contracts. Certainly the general rule as to contracts is that they must be executed by all the parties named in them before they will be binding on any.

See 9 Cyc. of Law and Procedure 299 and cases there cited.

In

Arnold vs. Scharbauer 116 Fed. 492,

a contract was made by A with B and C, A was under entirely separate liability to each, yet as C did not sign the contract it was held unenforceable by B.

The court says on page 495: (We use the terms A, B and C to denote the parties)

"By the express terms of the contract the obligation to put stock on the market after the creation of the corporation and to expose and sell it, is imposed upon C as much as it is on B. It is a reasonable inference that in agreeing to organize the corporation at their expense and trouble and investing it with the title to their 500 acres of land, the inducement of the defendants (A) thereto was that they should have the right to the services, influence and responsibility of C as much so as of B. In other words they were to have the personal responsibility of either; so

that in case of default on the part of the parties of the second part they could look for indemnity to both B and C. In short the defendants never came to a compact alone with B in the proposed enterprise."

See also

Wells vs. Dill (La.) cited in
Johnson vs. Township 39 Mich. 187, 189.

We shall not multiply authorities on this subject as our brief is perhaps too long already. We contend, however, that where a contract is drawn up to be executed by several and some do not execute it, the only just and sound rule is that the parties executing the contract are not liable in the absence of evidence that such parties intended to bind themselves despite non execution by the others. This rule may not always work justice but it will do so more frequently than the harsh rule contended for by plaintiff. We contend that in this case there was no mutuality of contract. The minds of the parties never met except on the theory that all the defendants should be bound.

The idea of holding Ables individually liable on the contract now in question is essentially unjust. Harrison himself drew up the agreement and procured its execution. (T. pp. 113, 123) The body of the agreement reads that it is an agreement between Magoon, McStocker, Emerson, Powter, Ables and others and Harrison and Gilmore. The agreement was not signed by Magoon, McStocker, Emerson or Powter except by agents who had no authority to sign for them. It was not signed by Moore at all though it purported to bind him. Harrison had full knowledge of the partnership articles and of the contents of the various powers of attorney. The consideration purporting to pass to Harrison was his being taken into the Hagey partnership, yet he could not be so taken in without the consent of *all* of the partners.

Harrison vs. Magoon 14 Haw. 418, 419, 422.

Harrison therefore never became a partner in the Hagey business and the mere fact that he transferred his sheep and sheep run to the partnership could not bind the partners. To hold Ables on such a contract is unfair. Ables was a layman with no knowledge of law and, as he himself naively says, he did not care what the sheep were worth but was willing to put

in any value suggested by Harrison (T. p. 81). Harrison on the other hand was a lawyer capable of drawing up a pretty stiff joint *and several* contract. To say that Ables meant to be liable individually for $10,000 despite the fact that Magoon, Emerson, McStocker and Powter could not be held requires, to say the least, a wide field of imagination. He thought that Magoon and the others could be held and acted on that belief. He undoubtedly relied on them to contribute their share of any loss which should follow.

We do not say that plaintiff might not have shown that Ables intended to be bound whether Magoon and the others were bound or not, but we cannot impute such folly to him from the mere contract. We think the just and sound rule is that each person named in the contract signs it on the implied understanding that all parties named therein will sign it and will be bound by it and that the cases to the contrary are, to use the language of Judge Campbell of Michigan, "essentially unjust." This is undoubtedly the rule as to joint contracts and why should there be any distinction made as to a joint and several contract?

See *Martin vs. Hornsby* supra.

It is true that in a joint and several contract a party undertakes an individual obligation as well as a joint one, but he relies on his right to a contribution from his co-obligors and if he is deprived of this he is forced into a contract which he had no intention of making and which is infinitely more burdensome than the contract which he did make.

There may be a great hardship on Harrison in this case, but it in no way approaches the hardship on Ables, who is now sought to be charged with a penalty of $10,000, which he never for a moment would have thought of incurring.

It was intimated by the Supreme Court of Hawaii that the question is open whether the parties who actually signed the agreement can be held jointly liable (14 Haw. 532) and now is a good time to consider this question. We submit in the first place that such was not intended to be the nature of the agreement and the cases above cited are fully applicable. In addition to this, however, the transaction, as Harrison well knew, could only be consummated by all the partners. This is a good ground for not holding Ables as well as a good ground to show that there was not a joint obligation merely on the part of those

who signed. Furthermore the obligation would have to be held joint on the part of those who signed *and ratified* and not merely on the part of those who signed if the theory is applicable at all. *Who* are the parties? All the joint obligors must be held on a joint liability or *none* can. Is Moore also to be held? Is Powter to be held? There is no evidence whatever as to Powter. His power of attorney may have been broader than the rest or he may have made a full and complete ratification. If he is a joint obligor he must be held, yet it is impossible to discover whether he is a joint obligor and hence he cannot be. We submit that the very nature of the agreement makes the joint liability in question impossible and also that the circumstances prevent such a holding. We have felt it wise to touch on this point, but have done so briefly, for the reason that it is not apparently relied on in any way by the plaintiff, except of course in his general reliance on any ground on which the court will give him judgment. Another point as to the joint liability theory is that the New Zealand judgment bars a joint liability.

See cases cited under that head.

It may here be mentioned that the grounds for not holding Ables cited under the cases heretofore cited would seem to apply also to Magoon, Emerson and McStocker for the reason that Powter is not shown to be liable. If Magoon, Emerson and McStocker be held to have ratified the agreement such ratification, made at the distance it was, could only have been upon the theory that all the parties mentioned in the agreement were bound by it. And all this also goes to show the absurdity of saying that there was a ratification of the agreement to pay Harrison $10,000 in case of his dissatisfaction.

4.

THE NATURE OF THIS CASE PREVENTS THE ENTRY OF ANY JUDGMENT AGAINST ABLES, IN THAT THERE IS A MISJOINDER OF DEFENDANTS.

The contract in this case has been spoken of as a joint and several contract. Plaintiff sets out that it was executed by all the defendants who are sued yet it turns out that Magoon, McStocker, Emerson and Powter did not execute it and that Moore did not sign it. The evidence thus discloses that there

is a clear misjoinder of parties defendant and hence we contend a several judgment cannot be rendered against Ables.

> "In actions ex contractu against several, if a joint contract be not proved against all the defendants except where there is matter going to the personal discharge of some of them, the plaintiff must be non-suited on the trial."
>
> 15 Encyc. Pl. & Pr. 582, and see cases there cited.
>
> "The case is therefore a direct authority for this position that in a suit upon a joint contract against three, the plaintiff is not entitled to recover against either of those parties, without proving a joint contract as laid, *although he does prove a contract, upon which the party against whom he seeks to recover is liable.* It is now perfectly well established that a misjoinder of plaintiffs is a ground *of nonsuit, as is also a joinder of too many defendants* . . . Upon a review of all the cases, we think there is no one which throws any doubt upon the rule of practice, that in an action upon contract against two or more, the contract must be proved as laid, and that in a trial upon the general merits the plaintiff cannot have a judgment against one or more, where all are not liable."
>
> *Tuttle vs. Cooper* 10 Pick. 281, 283, 291.

See also

Patterson vs. Loughridge 42 N. J. L. 21, 22, 23,
Walcott vs. Canfield 3 Conn. 194, 198.

We cite these two cases as especially strong ones from the mass of cases set out in 15 Encyc. Pl. & Pr. 582 supra. The rule is universal and we rely strongly on it in this case. There being a plain misjoinder of parties defendant a nonsuit is the only possible result.

Our statute (Revised Laws Sec. 1741) can make no possible difference in the case. Plaintiff has sued four defendants at least not shown to be liable. Hence there is a misjoinder as to those four either under or apart from the statute.

We see no remedy for plaintiff, but if there were one, it would be by a discontinuance or severance as to the defendants not liable. Plaintiff did not take this course and was rightly nonsuited.

This ground is also urged in behalf of all the defendants as the defendant Powter was joined and not shown to be liable. There was a clear misjoinder of Powter.

Another ground for affirmance closely allied with the last one is that there is a clear variance between the contract sued on and that actually proved. The contract sued on is alleged to have been made by all the defendants, but four are shown not to be liable.

5.

THE CONTRACT WAS INCOMPLETE AND, ACCORDING TO THE DOCTRINES OF THE SUPREME COURT OF HAWAII, CANNOT BE ENFORCED AGAINST ABLES ALONE.

The arguments already advanced practically constitute our case as we presented it to the Supreme Court of Hawaii at the last hearing before that court. It seems to us that they substantially answer the arguments advanced in Plaintiff's brief from pp. 38 to 55. Numerous cases are cited which were not cited below, but we do not deem it necessary to go into them in detail and are willing to rest our reply to them on the foregoing argument. As to the *bar* of the New Zealand Judgment, that was fully argued below, yet plaintiff has in no way met it in this case. As a supplemental argument to the foregoing, we wish, however, to quote from the last decisions of our Supreme Court both on the merits and on the motion for a rehearing.

> "In considering the demurrer in the first action the court construed the agreement that 'the parties of the first part for themselves individually and the said company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated' as being in effect that 'the parties of the first part do hereby jointly and severally make with the parties of the second part the following agreement of partnership." 13 Haw. 360. It is contended on behalf of the defendant Ables that this was *obiter dictum* and the court is not precluded from now considering whether a several liability was created by the agreement. In passing upon the demurrer the court decided upon the effect of not joining all of the contractors, but unless the declaration alleged a joint liability it would have been unnecessary to join them if there was a several liabil-

ity. The declaration appears to have been framed upon the theory of joint liability of the defendants Magoon, McStocker, Ables and Emerson. If they were jointly liable the other parties to the agreement were so also, and perhaps it was unnecessary to pass upon the question of several liability. We consider the question open for re-consideration. The agreement purports to be 'made this 20th day of September, 1897, between The African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members: T. E. Cowart, J. H. Kirkpatrick, and Geo. D. Moore, of the state of Texas, United States of America, A. E. Powter, on Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore and Thomas Milner Harrison, both of the city of Auckland in the colony of New Zealand, parties of the second part.' It is not clear in what sense the words 'individually' and 'collectively' are used. To hold that the members of the original partnership, in using the word 'individually,' intended that they should be severally bound if all were not would be going further than we think is authorized by the agreement. In denying the plaintiff's motion for a rehearing of the decision sustaining the demurrer the court said: 'Whether or not, if it shall appear hereafter that some of the persons named as defendants neither executed nor subsequently ratified the execution of the agreement, the others can still be held jointly liable, and . . . are questions which have not yet arisen and upon which no opinion is expressed." 14 Ib. 532. The court evidently had in mind the question whether the agreement would be complete unless all signed or ratified. Courts sometimes classify agreements between several persons as 'incomplete' if not signed by all who are named in them. This is on the theory of an implied term that all are severally bound in case only of all signing. In looking at the present agreement we reach the same conclusion by applying the theory of an implied term and by looking at the words used and the intended object. It is essential to a partnership agreement that each person mentioned as a partner severally agrees upon being so; and each of such persons can if he likes agree that the proposed partnership

shall do certain things, or that the old firm of which he is a member shall enter into the new partnership and then do certain things. We do not see any such undertaking in the language used in this agreement. 'In order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words. This intention is to be gathered from a careful consideration of the whole tenor and general intent of the contract, and not from any particular words of severalty contained in it." 2 Chit. Cont., 11 Am. Ed., 1354. An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any one of them unless all execute or subsequently ratify the agreement. The thing to be agreed upon was that all the parties named and not certain of them should form a partnership. If no partnership was formed then there were no partnership rights or duties created by the incomplete agreement. The agreement which purported to be made between the Hagey Co., composed of Cowart, Kirkpatrick, Moore, Powter, Magoon, McStocker, Ables and Lamb of the first part and Gilmore and Harrison of the second part, was that the Hagey Co. collectively and its members individually 'do hereby constitute and accept the said parties of the second part as partners as hereinafter stated." The partners who signed did not severally agree that they severally would form a partnership with Gilmore and Harrison but that all of the partners did so. The agreement was ineffective for the purpose of forming a new partnership in consequence of the failure of certain of the Hagey Co. partners to execute it, and therefore Gilmore and Harrison were not constituted or accepted as partners and acquired no partnership rights. The views above expressed render discussion of the other exceptions unnecessary."

16 Haw. pp. 337-340.

"This is a petition for a rehearing of the case reported ante, p. 332. It is based upon two grounds. The first is that at the original hearing the plaintiff, who is the petitioner, relied upon the ruling made in this case in 13 Haw. 360, that the contract sued on was joint and

several, and some of those purporting against such of them as had undertaken without due authority to bind all jointly, whereas the court, as it is contended, reconsidered the former ruling and held that the contract was joint and not joint and several, and overlooked the argument that even though it was joint a recovery could be had against some of the parties thereto if not against all. This ground is based upon a misapprehension of the view that the court took in its recent decision and which is set forth, clearly as it seems to us, on pages 338 and 339, ante. That decision was based on the ground that the contract sued upon was incomplete, whether it was joint and several or only joint in form. Among other things the court said, on page 339: 'An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any of them unless all execute or subsequently ratify the agreement.' It was also pointed out in that decision that the court, as it was constituted when the ruling was made that the contract was joint and several, considered it still an open question whether the contract was complete or not."

13 Haw. p. 486.

6.

RE PLAINTIFF'S CONTENTIONS AS TO THE "LAW OF THE CASE" (BRIEF pp. 30-31, 59-65).

The "law of the case," which plaintiff contends was settled by the ruling of the Supreme Court of Hawaii on the defendants' demurrer (13 Haw. 360), is claimed to be that the agreement sued on was "joint and several." Several arguments may be advanced which fully meet this contention and it is unnecessary to cite authorities to uphold them.

In the first place, the holding (if there was any such holding) was a mere dictum. When plaintiff's Complaint was filed, the defendants demurred thereto and the demurrer was sustained. Plaintiff then took a bill of exceptions to the Supreme Court of Hawaii, which held that the demurrer was *properly* sustained and *overruled* the exceptions. Any remarks outside of this were clearly obiter dicta and not the final "law of the case." It is not the case of a *reversal* of a judgment (as

in plaintiff's cases cited on pp. 61 and 62 of his brief), but of an *affirmance* of a judgment. Hence no question of the "law of the case" is here involved.

Secondly, suppose that our Supreme Court *did* hold as the "law of the case" on demurrer that the agreement sued on *was* "joint and several," still, if its final decision that it was not was *right, this Court* clearly would not set that decision aside in order that this apparently endless case might be tried again simply for the purpose of prolonging litigation and again bringing it to Washington for a correct decision. The decision of the Supreme Court of Hawaii might be the "law of the case" there, but it is certainly not the law of the case in the Supreme Court of the United States.

Thirdly, plaintiff's point as to the "law of the case" is fully and completely answered by the Supreme Court of Hawaii itself on the decision on the motion for a rehearing.

See 16 Haw. pp. 486-7.

7.

THE AGREEMENT WAS NOT JOINT AND SEVERAL IN ANY SENSE.

This point involves a pure question of the construction to be given to the agreement with Harrison, which should be carefully examined (See Exhibit C. Tr. pages 159-161). The agreement first recites that in consideration of certain following agreements "the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners, as hereinafter stated." The first clause following, relates to the capital of the partnership, the second acknowledges the receipt of 2250 pounds by the Company from Gilmore and Harrison, and the third provides that Gilmore and Harrison shall conduct the business of the partnership in Tasmania at a salary of 40 pounds per month each. The fourth clause, on which the plaintiff relies, provides that if within six months from the departure of Harrison for Tasmania, he is not satisfied with the conditions of the partnership business in Tasmania, *the Company* will give him stock of the market value equal to the amount paid by him, and the fifth clause provides for the interests which Gilmore and Harrison are to have in the part-

nership. The other two clauses need not be particularly cited.

Plaintiff's argument is that the clause which precedes the seventh subdivision makes each of the agreements in those subdivisions binding on the different partners collectively and on each one individually, and it was intimated that that was the proper construction in the decision in 13 Haw. at page 360. It seems to us, however, that such a construction is clearly improper. There is nothing to bear out the contention that each of the subdivisions was supposed to be prefaced by the first clause, and there is to positively oppose it, the fact already stated that it is specifically stated that it is the "Company" nad not the partners or the individual parties to the contract, that agrees to pay to the plaintiff of a certain amount of stock. It is true that Mr. Ables did accept the plaintiff as a partner on the conditions in question, but it is not true that Mr. Ables individually guaranteed to Harrison the sum of 2000 pounds, in case he was dissatisfied with the partnership business. No one looking at the agreement and the surrounding circumstances, including Ables' desire to get out of the partnership testified to by the plaintiff himself, could so believe.

See Tr. Page 99, where the following question and answer appear in Harrison's testimony:

Q. Do you know why the transfer of the sheep was made to Ables personally?

A. The explanation that Cowart and Kirkpatrick gave me was that Ables wanted to get out of the Company, and that he was willing to take this in part payment of his interest in the Company, that is for the purpose of buying him out, and that consequently it was to be transferred to him, and I was to get an interest in Tasmania, in lieu of the proportion of Mr. Ables' interest that I bought out.

Harrison further answered "I afterwards asked Mr. Ables if it were true, and he said he would rather ranch than stay in the Hagey business." Under all the circumstances, we cannot see how it can be claimed that Ables meant to bind himself individually or that he did bind himself individually to pay Harrison 2000 pounds. We think in the first place that the agreement cannot be read that way in any event, and in the second place it seems to us clear that the agreement construed in the light of the surrounding circumstances did not contemplate any such arrangement. The idea was that the

Company was to be bound to Harrison for this payment but not that each one of the individual partners was to be severally bound. We do not deem it necessary to cite authorities on this question, which is merely one of construction.

8.

PLAINTIFF'S PROPOSED AMENDMENT WAS RIGHTLY DISALLOWED.

On this point we are satisfied to quote from the decision of the Supreme Court of the Territory of Hawaii on the motion for a rehearing;

> "It is urged that this amendment may be allowed now by this court under the broad provision of the statute relating to amendments (Revised Laws, Sec. 1738) and under the view expressed in *Dowsett v. Jones,* 9 Haw. 543, and the cases there cited, to the effect that an amendment should be more freely allowed where, as in the present case, a new action would be barred by the statute of limitations.
>
> "We regret that we cannot take this view. It is true that the statute is broad and that it expressly permits amendments of certain kinds after as well as before judgment, but this does not mean that in addition to allowing an amendment the court may, as it would have to do in this case in order to make the amendment effective, reverse the judgment of nonsuit below and order a new trial when no error is found in the judgment below. If that judgment had been reversed and a new trial ordered, the court might also grant leave to amend before the new trial should be had. Likewise if the amendment were merely to conform the complaint to the proof, or otherwise was designed to support the judgment below, it might be allowed here, and of course, in such case, it would be effective without reversing the judgment below or ordering a new trial. The difficulty is that no error has been found in the judgment below, and in the absence of error that judgment cannot be reversed merely for the purpose of allowing an amendment and making it effective. This is the view generally taken elsewhere. For instance, in *Sutter v. San Francisco,* 26 Cal. 112, in which a similar proposition was made, the court said:

"The appeal is from the judgment, and we find no error to vitiate it. We hold that the court committed no error, so far as the record shows its action, and that the judgment is in all rsepects legal. We cannot, therefore, reverse it, for we find no error to justify such action, and plaintiff cannot now amend, because there is a valid final judgment; and there is nothing more to be done, without first reversing this judgment. It would be an anomaly in legal proceedings to hold the judgment in all respects correct, and then arbitrarily reverse it."

To the same effect, see *People v. Jackson,* 24 Cal. 630; *Gibbons v. Scott,* 15 Cal. 285; *Colorado Springs Co. v. Hopkins,* 5 Colo. 338; *Dennison v. Tyson,* 17 Vt. 549.

Most of the cases cited contra by the plaintiff are not in point. The case of *Balcom v. Woodruff,* 7 Barb. 13, however, is somewhat in point, for in that case the statute was almost identical with ours and the statute of limitations would have barred a new action, although other circumstances in the case were somewhat different from those in this case. The court there allowed an amendment *nunc pro tunc,* and then, without finding error in the judgment of nonsuit below, set aside that judgment and ordered a new trial in order to make the amendment of avail to the plaintiff. In support of this course the court cited an earlier case in the same jurisdiction (*Holmes v. Seely,* 17 Wend. 75), but said:

"This relief, however, is granted under the peculiar circumstances of this case, and the case is not to be made a precedent. The general rule is that a party who has not applied for an amendment until he has been nonsuited, is too late to ask for a new trial, in addition to an amendment."

In that case, it may be added, the plaintiff had moved in the lower court for leave to amend and for a new trial, as well as to set aside the judgment of nonsuit."

16 Haw. pp. 487 to 489.

9.

THE REFUSAL OF THE SUPREME COURT OF HAWAII TO HEAR THE EXCEPTIONS OTHER THAN THAT TO THE DISMISSAL OF THE MOTION FOR A NEW TRIAL WAS CORRECT, AND IN ANY EVENT SAID EXCEPTIONS ARE WHOLLY WITHOUT MERIT.

This point is well brought out by the decisions of this case in 16 Haw. pp. 179, 334, but we wish to add something thereto. The first question is whether any of plaintiff's exceptions except that as to the dismissal of plaintiff's motion for a new trial could be considered by our Supreme Court or even by the trial Judge under the general statement in the motion for a new trial that the court erred in admitting or excluding testimony (Tr. p. 207). The importance of this point is not great, because we shall show that the other exceptions are clearly untenable, but we wish to touch on it briefly.

We make the contention that in Hawaii motions for a new trial have been almost always made (except perhaps in the last year or two) solely on the ground that the verdict was contrary to the law and the evidence and the weight of the evidence. In any event we cannot at present recall a single case in Hawaii where a new trial was granted by the trial judge on any other grounds. Furthermore it has always been customary in bills of exceptions to specify particularly *by way of separate exceptions* every error relied on. As far as the Hawaiian practice goes, it makes strongly against the plaintiff and it will be a very trying day for court and counsel when plaintiff's contention is adopted and all concerned are left in blissful ignorance of the errors relied on until the appellant files his brief. Such a practice would be loose and unsatisfactory and does not merit this court's approval. And the practice of our Supreme Court has always been to require particularity in pleadings or papers where the case is brought before that court.

Fraga vs. Portuguese Ben. Soc. 10 Haw. 128
Kapuakela vs. Iaea 10 Haw. 97, 103
Serrao vs. Soares 11 Haw. 284, 285
Mist vs. Kapiolani Estate 13 Haw. 523, 526

See also

Territory vs. Watanabe 16 Haw. 196.

The reasoning of these cases would certainly seem to make their principles at least applicable to motions for new trial, for if every exception in the record may be brought up under the general grounds specified in the motion now in question the result which these cases attempt to avoid will inevitably be accomplished.

In

Mist vs. Kapiolani Estate supra it is said:

> "Counsel have no right to cast the burden on the court of searching through a voluminous record to find the ground of his objection and where the errors complained of are not squarely presented by the bill of exceptions, as in this exception, we shall follow the practice of this court and refuse to consider them."

And in

Fraga vs. Portuguese Benevolent Society supra

the following instructive rule is laid down:

> "An exception was taken to the decision and the findings of law and fact therein. Such an exception is too general and indefinite to be considered. The object of an exception as contemplated by the statute is to bring to this court a specific question of law upon which the trial Court has erroneously ruled to the prejudice of the party excepting, and not to enable the party to cast the entire case upon the court for review."

It is true that there is a conflict of authority in regard to the particularity needed in a motion for a new trial. We submit, however, that most of the states require more particularity than was used here and establish an infinitely sounder practice than the Western decisions on which plaintiff relies.

In

Barnard vs. Graham 14 Ind. 322

the statute expressly made "error of law occurring during the trial" a ground for a new trial, yet the court held such a statement too vague, saying:

"Numerous errors might occur on the trial and be excepted to; and the motion for a new trial ought to point out such as are relied on, so that the attention of the court would be directed to them. Otherwise it would be of little use to have written reasons filed at all . . . . . If the general language employed in this case be sufficient the Court would be required to review all its various rulings to which the party had taken exception, although the party called its attention to but one, or, indeed, to none of them, on the motion for a new trial."

See also

37 Am. Dig. New Trial S. 258

where it is laid down as the rule of numerous cases:

"To allege that court erred in receiving or rejecting evidence is not a sufficiently definite assignment of reasons for a new trial. The particular evidence with regard to which error is alleged should be pointed out."

See also

19 Pac. 46,
23 S. E. 119,
22 Conn. 326, 333,
34 N. C. 151,
23 Me. 556,
14 Encyc. Pl. & Pr. 890.

As to defendant's citations on these points it is wholly unnecessary to consider them in detail. Because the books on Practice say that errors occurring during the trial are ground for a new trial, it does not follow that a mere statement that such errors occurred is a sufficient pleading of the particular errors. And many of the authorities cited seem also to point to this conclusion. We are strongly inclined to believe that the great weight of authority requires far greater particularity than is used in this case, but, after all, the authorities are conflicting and it is largely a question of principle and convenience.

The next point to be considered is whether any of the plaintiff's first fifty-three (53) exceptions present any reversible

error, assuming that they can be considered. Plaintiff seems to rely on almost all of them and casts them all upon the court's mercy in the apparent hope that one at least among so many may be held well taken. It is to be remembered in this discussion that there is no question of misleading the jury, but merely a question of how far the errors affected the *nonsuit* which was granted. And if, despite any errors, the nonsuit was correctly granted on any ground which said errors did not affect, then it is clear that those errors are wholly immaterial on this appeal. We will now take up the various exceptions in their order:

EXCEPTION 1: A mere statement of opinion and no authority shown to bind Moore. And in any event we admit that there was probably sufficient evidence of Moore's ratification, so the alleged evidence is immaterial and cannot affect the nonsuit.

EXCEPTIONS 2, 3, 4 AND 5: The answers stricken out were all clearly irresponsive or hearsay and also are now immaterial for the reasons stated under Exception 1.

EXCEPTION 6: The question objected to in no way tended to bring out the knowledge of defendants of the Harrison agreement, which is the only claim now made by plaintiff in regard thereto. Furthermore it is clear from the evidence that no dividends were ever returned.

EXCEPTION 7: The objection in question was sustained after the answer had been given. Furthermore there was no question but that Ables knew of the contents of the agreement.

EXCEPTION 8: The question was clearly immaterial. What Ables did in regard to the New South Wales matter did not tend to show that *the other defendants* knew about the methods pursued.

EXCEPTION 9: The objection here can have no possible bearing on whether the nonsuit was rightly granted.

EXCEPTION 10: The objection here also cannot possibly affect the nonsuit. Further it was material to show the circumstances.

EXCEPTION 11: Again we are not told how this objection affects the nonsuit. It cannot affect it.

EXCEPTION 12: The question here asked merely followed up Ables' previous testimony as to a variance between the contract signed and the one produced. Moreover, for the purposes of the nonsuit, the contract produced must of course be accepted.

EXCEPTION 13: The letter from Ables to McStocker was

one of a chain, same being introduced by plaintiff. It also has no bearing on the question of a nonsuit.

EXCEPTIONS 14 AND 15: The same remarks apply to these exceptions as to Exception 13.

EXCEPTION 16: The trial balance was clearly admissable with the letter accompanying it.

EXCEPTION 17: We have here something which was a matter for direct but not for redirect examination.

EXCEPTIONS 18, 19, 20, 21, 23, 24, AND 25: The letters here offered were referred to in Plaintiff's Exhibit K, and were admissable to explain the statement there made in regard to them. Even if th letters be held to have been introduced at an improper time, there is clearly no reversible error.

Ahmi vs. Waller 15 Haw. 498, 501.

Moreover, while the letters tended to show that there was no ratification of the original unauthorized transaction by the defendant Magoon, plaintiff could not have been nonsuited if there was *any* substantial evidence of ratification and the question of the nonsuit is therefore unaffected.

EXCEPTION 26: This exception is clearly groundless, the question being wholly immaterial. It in no way tended to show any knowledge on the part of the witness.

EXCEPTIONS 27 AND 28: If Plaintiff put on any evidence of ratification, which we doubt, this evidence was clearly rebuttal to show that defendants did their best to repudiate the transaction in question. Also the question of nonsuit was unaffected bv it for the reasons pointed out under Exceptions 18-25.

EXCEPTION 29: The question here asked was an attempt to impeach plaintiff's own witness. Moreover, as it is clear that Moore *did* come to Honolulu and see the defendants, the question of nonsuit was wholl unaffected.

EXCEPTIONS 30-39: These exceptions do not deserve discussion nor do they seem much relied on by plaintiff. Furthermore Ables does not rely on the ground of nonsuit to the effect that there was no bona fide dissatisfaction on the part of the plaintiff. It is admitted for the sake of argument that this was a question for the jury, if plaintiff is not to be nonsuited on some other independent ground.

EXCEPTION 40: This exception is trivial. The answer was *not* responsive to the question and in any event all it brought out was brought out later.

EXCEPTION 41: The answer stricken out was clearly hearsay and in any event we make no point that no bona fide dissatisfaction was shown.

EXCEPTIONS 42-47: Most of the questions and answers in question called for or gave purely opinions and conclusions of the witness and the objections were all well taken. And we again call attention to the fact that we do not rely on the question of their being bona fide dissatisfaction shown. We expect to sustain the nonsuit on grounds wholly unconnected with this one.

EXCEPTIONS 48 AND 49: These questions were pure questions of law and in any event had and could have had no effect on the granting of the nonsuit.

EXCEPTION 50: The question here was immaterial and in any event was fully answered a moment or so later.

EXCEPTION 51: Harrison was not shown to be qualified to testify to the value of the sheep and sheep run. Their value was also wholly immaterial as regards the nonsuit.

EXCEPTION 53: Here again the testimony had no bearing on the propriety of granting a nonsuit.

We have carefully examined all of the above exceptions and are unable to perceive why any of them are before the court at this time. Most of the exceptions, when viewed in the light of the fact that a nonsuit was granted and the case never went to the jury, are wholly trivial. We think that this Court should express its disapproval of the practice inaugurated by plaintiff in this case. While it may be well to preserve all of one's exceptions and find out law by careful study which are material, it is unfair to both court and counsel to lavishly cast all upon the court with so poor a justification of them as is presented in plaintiff's brief. We submit that none of the exceptions in question are tenable.

And we further wish to point out that this Court will surely not reverse the decision of the Supreme Court of Hawaii for the reasons suggested, if the judgment of Nonsuit was in fact *correct*. To do so would merely be to prolong litigation.

10.

THE DECISION ON PLAINTIFF'S BILL OF EXCEPTIONS WAS NOT A "FINAL JUDGMENT" AND HENCE NO WRIT OF ERROR LIES.

As the decision of our Supreme Court in *Meheula vs. Pioneer Mill Co. Ltd.*, 17 Haw. 91, establishes that the Supreme Court of Hawaii has no power to enter up a final or any judgment on exceptions, we are of the opinion that the ruling on the exceptions *is* a final judgment to which a writ of error will lie. This court may, however, decide otherwise and we desire to raise the point for what it is worth.

> See Bierce vs. Hutchins (now before this Court on a similar question).

11.

THE ACT OF MARCH 3RD, 1905, ALLOWING APPEALS AND WRITS OF ERROR FROM THE SUPREME COURT OF HAWAII TO THE SUPREME COURT OF THE UNITED STATES DOES NOT APPLY TO CASES WHERE JUDGMENT WAS RENDERED BEFORE THE ACT TOOK EFFECT, AS IN THIS CASE.

The ruling on the exceptions in this case took place on December 19th, 1904, (Tr. p. 231), before the Act in question took effect. Whether such a prior judgment is reviewable will be decided in the case of *William Notley et al vs. Cecil Brown et al* now before this Court on motion to dismiss the Writ of Error. We submit the question now presented on the decision on that motion.

12.

THE FACT THAT THE MOTION FOR A REHEARING IN THIS CASE WAS NOT DECIDED TILL MARCH 6TH, 1905, GIVES THE PLAINTIFF NO RIGHT TO A WRIT OF ERROR WHICH HE DID NOT BEFORE POSSESS.

Plaintiff's exceptions in this case were overruled on December 19th 1904 (Tr. p. 231), his motion for a rehearing was filed January 24th 1905 (Tr. p. 261), argued February 20th 1905 (Tr. p. 261) and decided March 6th 1905 (Tr. p. 262). The Act of Congress allowing appeals was passed on March 3rd 1905. The decision on the motion was not the final judgment in the cause, and the fact of an appeal does not ever prevent a motion for a rehearing from being made.

See Taylor on U. S. Supreme Court p. 179 and cases there cited.

Even if we assume that the decision on the motion for a rehearing might be the subject of appeal, it certainly cannot be used to bring up an entire record, where no such right would otherwise exist. Lack of time prevents a complete treatment of this point, as well as several others.

13.

Several other points are presented in Mr. Magoon's brief better than we could present them and we shall not repeat them here. We rely, however, on those points as well as on the ones here presented.

In conclusion we have only to add that until lately we had thought this case would not come up till March, we have only recently received plaintiff's brief, and amidst the stress of other duties we have not been able to prepare as careful or elaborate an argument as we should have liked to have done. We submit that plaintiff has failed to show cause for a reversal of the judgment of the lower court and a new trial.

Dated, Honolulu, December 8th, 1906.

E. B. McCLANAHAN,,
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S. H. DERBY,
Of Counsel.